United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

12-N

601

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,832

United States of America, Appellee

v.

Joseph D. Gantt, Appellant

Appeal from the United States District
Court for the District of Columbia

Paul A. Lenzini
932 Pennsylvania Building
Washington, D. C. 20004

Counsel for Appellant
Appointed by This Court

STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellant, the following questions are presented:

1. Whether evidence is legally sufficient to support verdicts of guilty of armed robbery and assault with a dangerous weapon where the evidence indicates that appellant's weapon was not loaded?

2. Whether the evidence on aiding and abetting was legally sufficient to show a conscious effort to assist the conduct of the principal actor?

3. Whether the conviction of appellant for offenses in which he was charged as principal actor was secured improperly through evidence of offenses in which he was charged as aider and abettor.

4. Whether appellant's conviction for offenses in which he was charged as principal actor were vitiated by the trial court's unlimited instruction that appellant could be found guilty of the crimes charged without a finding that he committed each element of the offense.

5. Whether a complainant's identification of the other man was admitted improperly in light of a post-arrest stationhouse showup conducted in violation of appellant's rights under the Sixth Amendment.

This case has not previously been before this Court either under the same or a similar title.

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TABLE OF CASES

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* Cases chiefly relied upon are marked by asterisks.

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STATUTES AND RULES

OTHER AUTHORITIES

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,832

UNITED STATES OF AMERICA, Appellee

v.

JOSEPH D. GANTT, Appellant

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was convicted in the United States District Court for the District of Columbia under 22 D.C. Code §§ 2901 and 3202 (armed robbery), §22-502 (assault with a dangerous weapon), and §22-3214(a) (possession of a prohibited weapon). On February 7, 1969, judgment of conviction of the above offenses was entered, and appellant was sentenced to a term of imprisonment. Notice of appeal was filed on February 17, 1969. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291.

STATEMENT OF THE CASE

On July 17, 1968, Appellant and one Gregory Murphy were jointly indicted in Criminal No. 1062-68 on eight counts. Count one charged that appellant Gantt and Gregory Murphy committed armed robbery of John

REFERENCES TO RULINGS

None.

Decker, a Safeway Store employee, on or about May 11, 1968. Count two charged the two men with robbery of Decker, and count three charged them with assaulting Decker with a dangerous weapon. Count four charged appellant and Murphy with armed robbery of Gary Swenson, also a Safeway Store employee, on or about May 11, 1968. As in counts two and three, counts five and six charged the two men with robbery of Swenson and with having assaulted him with a dangerous weapon. Count seven charged appellant with possession of a sawed-off shotgun, and count eight charged Murphy with carrying a pistol without a license.

The case came on for trial before Judge Green on January 8, 9, and 10, 1969, and on oral motion of the government, defendants were severed for trial. Count eight relating to Gregory Murphy alone was dismissed by the government prior to trial of appellant, and the indictment was retyped deleting reference to Murphy and without mention of count eight.

Gary Swenson testified that on the evening of May 11, 1968, at about 8:30 he was checking out customers of the Safeway Store at one of four cash registers in the store. The witness testified that he was "pretty busy" when his customer, a woman accompanied by children, told them to "keep still and be calm" (Tr. 7).* The woman was looking toward the corner of the store and, turning, Swenson noticed a man "standing right behind me" (Tr. 8).

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* The transcript of proceedings at trial in this case are set forth in two volumes, one volume containing pages 1 through 150 and another volume containing pages 201 through 309. It is apparent that the pages in the second volume are misnumbered and should begin with page 151 rather than page 201.

I looked at him and he looked downwards, and I followed his eyes" and "saw that he had a shotgun by his knee, underneath a raincoat" (Tr. 8). According to the witness, at no time did the man point the shotgun at him but held it "alongside his leg" (Tr. 29-30, 33). The witness testified that the man said "Let me have the money" (Tr. 8). Complying, the witness testified that he started putting money in a bag and asked whether the man wanted the checks and received the response, "Yes, give me everything" and also that he asked whether the man wanted the change to which the man replied, "No, just the bills" (Tr.). The witness Swenson further testified that he handed the bag to the man and thereafter watched him go out the door a couple of feet ahead of another man (Tr. 11). With respect to the other man, Swenson testified that he had looked over to another cash register and "could see someone and he looked like he was acting kind of funny but I didn't see him fully" (Tr. 10). According to Swenson, the man who robbed him was met at the door by Detective Bader (Tr. 9). The witness Swenson did not on direct examination identify appellant as the man who robbed him.

Under cross-examination, Swenson testified that he had seen appellant at the time of the robbery but not later at the police station (Tr. 20). Concerning the other man, Swenson testified that he "didn't watch the other man at all" and "didn't notice" whether the other man carried two bags as he left the store (Tr. 34). However, the witness testified at another point that as the other man was going out he noticed the man had a moustache, wore a light tan trench coat, and hat (Tr. 15). The witness Swenson also testified that he had seen the other man at the police station (Tr. 12).

John Decker testified that on the same evening he was checking out customers of the Safeway Store at another cash register. Over objection of defense counsel, Decker testified that a man came into his check-out line, pushed an automatic pistol through his coat which he pointed at Decker (Tr. 54), and told Decker to remove the cash and place it in a bag (Tr. 40-41). Decker testified that the man who robbed him walked out with "this other man that seemed to be waiting for him at the door" (Tr. 42). Decker stated that he saw the other man "standing in the check-stand No. 1 and they turned and went out the door" (Tr. 42). According to Decker, the man in his lane went out the door first (Tr. 42, 50), thereby creating a conflict in the testimony on this point. As the two men got to the door, they encountered two other men, according to the witness (Tr. 50). Over objection of defense counsel, Decker identified the man who robbed him as Gregory Murphy (Tr. 44).

Detective Bader testified that on May 11, 1968, he was assigned to the 6th Precinct and was on routine patrol with Detective Yeager when the latter observed two men outside the Safeway Store. The two men entered the store, according to Bader, and one without sun glasses walked over to a cash register and, walking between a customer and the clerk, "held his hand in his right coat pocket" (Tr. 57). Bader could not see the other man (Tr. 57). On cross-examination Detective Bader testified that he was able to see inside the store because he was driving the unmarked cruiser, made a U-turn on Georgia Avenue and double-parked the car between two parked cars so as to see through the large plate-glass window at the front of the store (Tr. 68-69).

Detective Bader fended off an implication that he could not simultaneously drive and observe by testifying that "I had my foot on the brake. I had it [the cruiser] fully under control" (Tr. 68). Yet, at the preliminary hearing held the day following the incident, Detective Bader testified that he was not driving but was on the passenger side of the car (Transcript of Preliminary Hearing, p. 4).

Detective Bader also testified that "the fellows were walking towards the exit" (Tr. 58), whereupon Bader grabbed one of the men as they came out and identified appellant as the man (Tr. 58). Detective Bader testified that appellant had a sawed-off shotgun and that he took from appellant's pocket two or three shotgun shells. (Tr. 60). The shotgun was unloaded at the time of appellant's arrest (Tr. 63, 64). Detective Bader also observed a paper bag in appellant's left hand (Tr 60). Detective Bader testified at preliminary hearing that the Safeway reported that approximately $246 had been taken and that the money was taken from John Decker (Transcript of Preliminary Hearing, p. 5). Later in the preliminary hearing, Detective Bader again testified that the $246 was taken entirely from Decker (Transcript of Preliminary Hearing, p. 8) but shortly thereafter changed his testimony, saying that the $246 was not taken entirely from Decker (Id., p. 8).

Detective Yeager testified that he was assigned to the 6th Precinct on May 11, 1968, and was working in plain clothes with Detective Bader when they "saw two subjects with long coats on going into the Safeway Store" and then observed them in the line of cash registers (Tr. 72). Yeager testified

that he and Bader arrested the two subjects as they came out the door (Tr. 74). Yeager identified the man he arrested as Gregory Murphy (Tr. 77). Murphy at time of his arrest had a loaded pistol in his hand and "two brown bags in his left hand" containing several checks and some currency (Tr. 75, 78). Murphy also had a loaded pistol in his pants pocket (Tr. 76, 84, 88). Detective Yeager identified appellant as the man stopped by Detective Bader (Tr. 77).

After appellant and Murphy were arrested, the two men were immediately transported to the detectives' room at the 6th Precinct where an identification was made (Tr. 93). During the identification at the detectives' room, no attorney was present (Tr. 94).

Dennis Bailey, manager of the Safeway Store at 6101 Georgia Avenue on May 11, 1968, testified for the government that an audit of cash registers after the robbery showed $232.31 missing from the register attended by Gary Swenson and $202.07 missing from the register attended by John Decker (Tr. 109, 111).

Appellant testified on his own behalf and denied having participated in the robbery (Tr. 132, 134). According to his testimony, appellant pleaded guilty to robbery in January 1966 and was placed on probation (Tr. 129). Thereafter appellant became associated with Youth Enterprise, Inc. (Tr. 127), established to train and develop entrepreneurial skills in young men (Tr. 215). Appellant testified that he was soon to become co-manager of an automobile service station on Georgia Avenue and had purchased the shotgun for use in

protecting funds of the service station (Tr. 126). Appellant testified that he had purchased the shotgun from Gregory Murphy at the latter's home one block from the Safeway Store on the evening of May 11, 1968, and then took leave of Murphy (Tr. 125). Appellant testified that after leaving Murphy he stopped at a carry-out store and then crossed Georgia Avenue and went into the Safeway Store to get a package of cigarettes (Tr. 125). Entering the store, appellant testified that he came upon what appeared to be a robbery in progress, whereupon appellant, desiring not to become involved (Tr. 209), went out the side door of the Safeway where he was grabbed by Detective Bader (Tr. 125).

Edwin Bethea, executive director of Youth Enterprise, Inc., confirmed that appellant had been recently sent to a four-week Gulf Oil Corporation training school for service station managers in Alexandria, Virginia (Tr. 220), confirmed that appellant was to have co-responsibility for the service station once arrangements then being negotiated were completed (Tr. 220, 224), and testified that he had discussed with appellant measures to protect the service station from robbery (Tr. 225).

Appellant's motion for judgment of acquittal on counts one through six made at the close of the government's case in chief and renewed at the end of defendant's case was denied (Tr. 99-107, 233). The case was submitted to the jury which was instructed, inter alia, that a sawed-off shotgun as a matter of law is a dangerous weapon (Tr. 291). The jury returned a verdict of guilty on counts one, three, four, six and seven (Tr. 308). Judgments of

conviction on all of said counts were entered with sentences of ten to thirty years on the armed robbery counts, three to ten years on the aggravated assault counts, and one year for possession of a prohibited weapon, the sentences to run concurrently.

STATUTES AND RULES INVOLVED

22 D.C. Code §105 (1967 ed.), 31 Stat. 1337:

> In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

22 D.C. Code §502 (1967 ed.), 31 Stat. 1321:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

22 D.C. Code §2901 (Supp. II, 1969), 31 Stat. 1322, as amended, 81 Stat. 737:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than two years nor more than fifteen years.

22 D.C. Code §3202 (Supp. II, 1969), 47 Stat. 650, as amended, 81 Stat. 737:

> If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm, or other dangerous or deadly weapon, including but not limited to, sawed-off shotgun, shotgun, machinegun, rifle, dirk, bowie knife,

> butcher knife, switchblade knife, razor, blackjack, billy, metallic or other false knuckles, he may in addition to the punishment provided for the crime be punished by imprisonment for an indeterminate number of years up to life as determined by the court. If a person is convicted more than once of having committed a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm, or other dangerous or deadly weapon, including but not limited to, sawed-off shotgun, shotgun, machinegun, rifle, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, metallic or other false knuckles, then, notwithstanding any other provision of law, the court shall not suspend his sentence or give him a probationary sentence.

22 D.C. Code §3214(a) (1967 ed.), 47 Stat. 654, as amended, 67 Stat. 94:

> (a) No person shall within the District of Columbia possess any machine gun, sawed-off shotgun, or any instrument or weapon of the kind commonly known as a blackjack, slung shot, sand club, sandbag, switch-blade knife, or metal knuckles, nor any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms: Provided, however, That machine guns, or sawed-off shotguns, and blackjacks may be possessed by the members of the Army, Navy, or Marine Corps of the United States, the National Guard, or Organized Reserves when on duty, the Post Office Department or its employees when on duty, marshals, sheriffs, prison or jail wardens, or their deputies, policemen, or other duly-appointed law-enforcement officers, officers or employees of the United States duly authorized to carry such weapons, banking institutions, public carriers who are engaged in the business of transporting mail, money, securities, or other valuables, wholesale dealers and retail dealers licensed under section 22-3210.

Federal Rules of Criminal Procedure, 18 U.S.C. Appendix (1964 ed.), Rule 8(a):

> Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or

> similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Federal Rules of Criminal Procedure, 18 U.S.C. Appendix 1964, Rule 52(b):

> Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF POINTS

1. The evidence, which indicated that appellant's weapon was not loaded, was legally insufficient to support verdicts of guilt of armed robbery and assault with a dangerous weapon.

2. The evidence was legally insufficient to justify conviction of appellant as an aider and abettor.

3. Conviction of appellant for offenses in which he was charged as principal actor was secured improperly through evidence of offenses in which he was charged as aider and abettor.

4. The trial court committed prejudicial error in instructing the jury it could find appellant guilty of the crimes charged without finding that he committed all elements of the offense.

5. Appellant and Gregory Murphy were subjected to an illegal confrontation in violation of Sixth Amendment rights subsequent to their arrest, and the courtroom identification of Murphy was admitted erroneously.

SUMMARY OF ARGUMENT

1. This Court has held that a dangerous weapon is one likely to produce death or great bodily injury. Tatum v. United States, 71 App. D. C. 393, 110 F. 2d 555 (1940). The evidence in the instant case indicated that appellant's shotgun was unloaded at the time of the robbery. A number of courts have held that an unloaded weapon is not a dangerous weapon for purposes of armed robbery or aggravated assault statutes. An unloaded shotgun not used as a club is not a dangerous weapon, and appellant could not properly be convicted of armed robbery and assault with a dangerous weapon under counts 4 and 6.

2. To convict one of aiding and abetting the commission of a criminal offense, the government must prove beyond a reasonable doubt that defendant made some conscious effort to assist or protect the criminal conduct of the principal actor. Allen v. United States, 103 U.S. App. D. C. 184, 186, 257 F. 2d 188, 190 (1958). The evidence was such that a reasonable mind could not fairly conclude beyond a reasonable doubt that appellant participated in the robbery of John Decker.

3. The theory of aiding and abetting is to establish criminal responsibility for acts which one assists another in performing. Nye & Nissen v. United States, 336 U.S. 613 (1949). Here the government utilized the theory of aiding and abetting in a manner prejudicial to appellant by improving a weak case against appellant for the robbery in which he was charged as principal actor.

4. It is fundamental that the government carries the burden of proving beyond a reasonable doubt every element of an offense charged. Here the trial court instructed the jury that it could find appellant guilty of the crimes charged without finding that he committed all the elements of the offense. It was plain error for the court to fail to limit properly such an instruction.

5. Appellant and Gregory Murphy were subjected to an illegal confrontation at the police station at which counsel was not present subsequent to their arrest. At trial one of the complainants identified Murphy as the man who robbed him. The record does not contain clear and convincing evidence of an independent source for such identification, and the admission of such identification was prejudicial error.

I. The Evidence, Which Indicated That Appellant's Weapon was Not Loaded, Was Legally Insufficient To Support Verdicts of Guilt of Armed Robbery And Assault With a Dangerous Weapon.

With respect to this argument, appellant desires that the Court read the following pages of the reporters' transcript: Tr. 1-10, inclusive; Tr. 29-37 inclusive; Tr. 42-43 inclusive; Tr. 56-65 inclusive; Tr. 99-104 inclusive; and Tr. 291.

Count four of the indictment charged appellant with the robbery of Gary Swenson while armed with a dangerous weapon. Count six charged that appellant assaulted Gary Swenson while armed with a dangerous weapon. At the close of the government's case, defense counsel moved for judgment

of acquittal on grounds, inter alia, that the testimony showed that the shotgun was unloaded (Tr. 102). The motion was denied as was a similar motion renewed near the close of testimony (Tr. 233), the trial judge stating "The Court is going to accept the fact that this was armed with a dangerous weapon." (Tr. 104).

Testimony during the government's case-in-chief disclosed that Detective Bader apprehended appellant at the exit of the Safeway immediately after the robbery (Tr. 9, 50), and at that point took the shotgun from appellant. On cross-examination, Detective Bader testified that when he examined the weapon at the precinct thirty minutes after taking it from appellant he found it to be unloaded (Tr. 63-64). At that point the attorney for the government announced that ' the government is not going to offer any evidence that the gun was loaded" (Tr. 64). Moreover, the complainant Swenson testified that appellant at no time pointed the shotgun at him but merely held it down alongside his leg (Tr. 33). Given this state of the evidence, a reasonable mind could not fairly conclude beyond a reasonable doubt that the shotgun was loaded at the time of the robbery. Curley v. United States, 81 U.S. App. D.C. 389, 160 F. 2d 229 (1947), cert. denied, 331 U.S. 837.

The statute dealing with armed robbery, viz., committing crime when armed, 22 D.C. Code §3202 (Supp. 1969), provides:

> If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm, or other

> dangerous or deadly weapon, including but not limited to, sawed-off shotgun, shotgun, machinegun, rifle, dirk . . . he may in addition to the punishment provided for the crime be punished by imprisonment for an indeterminate number of years up to life as determined by the court.

The code provision relating to assault with a dangerous weapon, 22 D.C. Code §502 (1967 ed.), provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

So far as counsel is aware, this Court has never considered the question whether a robbery committed by one armed with a sawed-off shotgun amounts to armed robbery where the evidence discloses almost to a certainty that the weapon was unloaded and where the evidence discloses that the weapon was not used as a club. Similarly, there appear to be no decisions in this Court on the question whether the offense of assault with a dangerous weapon is made out in such circumstances.

Unlike some jurisdictions whose statutes on armed robbery indicate that the offense is committed whether a weapon is loaded or unloaded, 22 D.C. Code §3202 contains no such language. Our provision refers to persons armed with or having readily available "any pistol or other firearm, or other dangerous or deadly weapon, including but not limited to, sawed-off shotgun . . . ." It is apparent from the terms of the statute that a sawed-off shotgun is set forth specifically as an example of the statutory genus of dangerous or deadly weapons. A dangerous weapon,

however, "is one likely to produce death or great bodily injury," Tatum v. United States, 71 App. D.C. 393, 110 F. 2d 555 (1940), and thus an unloaded shotgun would not qualify as a dangerous weapon unless it were used as a striking implement. Appellant submits that the enumerated weapons must be restricted by the statutory criterion, "dangerous or deadly," else mechanically inoperable or simulated weapons would be included within a statute which carries with it a potential life sentence. The House and Senate reports on H.R. 10783, the 1967 District of Columbia Crime Bill which was later enacted, contain no suggestion that the enumerated weapons are to be considered as falling within the statute apart from consideration as to whether they are dangerous or deadly. See H. Rep. No. 387, 90th Cong., 1st Sess. 28, 36, 58 (1967); S. Rep. No. 912, 90th Cong., 1st Sess. 21-22, 28 (1967).

In Parker v. United States, 123 U.S. App. D.C. 343, 359 F. 2d 1009 (1966), this Court was urged to hold that the statute governing assault with a dangerous weapon, 22 D.C. Code §502, required a finding of specific intent to inflict injury. Declining this invitation, the Court through Judge McGowan stated:

> The potential for serious bodily harm through the reckless use of dangerous weapons is as substantial as it is obvious. Use of such weapons, even when there is no specific intent to employ them to inflict injury, is invariably fraught with the possibility of dangerous consequences. Imposing more serious sanctions for assault with a dangerous weapon than for simple assault is a practical recognition of the additional risks posed by use of the weapon. 123 U.S. App. D.C. at 346, 359 F. 2d at 1012.

The Court in Parker further found that "the gist of the crime is found in the character of the weapon with which the assault is made." 123 U.S. App. D.C. at 346, 359 F. 2d at 1012. If intent to inflict injury is not required, appellant submits that the weapon must be of such a character as to be able to inflict injury if utilized. An unloaded shotgun is not of such a character unless used to strike.

Other courts under statutes similar to our own have held that unloaded guns are not dangerous weapons. In Price v. United States, 156 Fed. 950 (9th Cir. 1907), defendant was charged with assault with a dangerous weapon. The lower court found that appellant drew a revolver and pointed it at the complaining witness and that, unknown to complainant, the revolver was unloaded. Holding that the evidence made out a simple assault but not assault with a dangerous weapon, the court reversed, stating:

> We think, upon the facts stated, the judgment of the court, convicting the defendant of an assault with a dangerous weapon, cannot be sustained. In order to constitute that offense, a dangerous weapon must be used in making the assault. The use of a dangerous weapon is what distinguishes the crime of an assault with a dangerous weapon from a simple assault. A dangerous weapon "is one likely to produce death or great bodily injury." U.S. v. Williams (C.C.) 2 Fed. 64. Or perhaps it is more accurately described as a weapon which in the manner in which it is used or attempted to be used may endanger life or inflict great bodily harm. And it is perfectly clear that an unloaded pistol, when used in the manner shown by the evidence in this case, is not, in fact, a dangerous weapon. If the defendant had struck or attempted to strike with it,

> the question whether it was or was not a dangerous weapon in the manner used, or attempted to be used, would be one of fact; but the courts quite uniformly hold as a matter of law that an unloaded pistol, when there is no attempt to use it otherwise than by pointing it in a threatening manner at another, is not a dangerous weapon. 156 Fed. at 952.

Other cases holding that an unloaded gun is not a dangerous weapon under armed robbery or aggravated assault statutes are Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42 (1885); People v. Wood, 19 A.D. 2d 231, 199 N.Y.S. 2d 342 (1960) (but see dictum in People v. Roden, 21 N.Y. 2d 810, 288 N.Y.S. 2d 638 (1968)); State v. Godfrey, 17 Or. 300, 20 Pac. 625 (1889); State v. Mier, 74 So. Dak. 515, 55 N.W. 2d 74 (1952); Luitze v. State, 204 Wisc. 78, 234 N.W. 382 (1931). Cf. Hutton v. People, 156 Colo. 1334, 398 P. 2d 973 (1965). Other decisions hold that where evidence shows that a gun is employed in a threatening manner a prima facie case is established and the weapon is presumed to be dangerous until the contrary is proved. E.g., United States v. Wood, 28 Fed. Cas. 754 (No. 16,756) (instructions of Circuit Justice Washington); Davis v. State, 225 Md. 45, 168 A. 2d 884 (1961); State v. Parr, 54 Or. 316, 103 Pac. 434 (1909). The decisions are not uniform and some courts hold that a gun is a dangerous weapon whether or not loaded. E.g., People v. Rainey, 125 Cal. App. 2d 739, 271 P. 2d 144 (1954); State v. Ashland, 259 Iowa 728, 145 N.W. 2d 910 (1966); State v. Montano, 69 N.M. 332, 367 P. 2d 95 (1961); Turner v. State, 300 S.W. 2d 920 (Tenn. 1957). According to Wharton, it is "generally held that an unloaded gun, used only as a firearm, is not

a dangerous weapon within the contemplation of statutes punishing as aggravated assault assaults made with a deadly or dangerous weapon. But it has also been held that an unloaded gun or pistol is a dangerous weapon within the meaning of a statute denouncing robbery, or assault with intent to rob, while armed with a dangerous weapon." 3 Wharton Crim. Law & Procedure, §961, 113-14 (1957). The commentator offers no reason for a distinction with respect to the two offenses, and appellant submits that no distinction may be drawn where a dangerous weapon is necessary to the commission of both offenses.

22 D. C. Code §3202 proscribes commission of crimes of violence by persons "armed with or having readily available any pistol . . . ." Upon arresting appellant as he was leaving the Safeway, Detective Bader testified that he took from appellant's pocket two or three shotgun shells (Tr. 60). Clearly, "having readily available" means that the dangerous weapon is readily available not that shells are readily available.

In summary, the trial court in the instant case stated its view that appellant was "armed with a dangerous weapon" (Tr. 164) and indeed instructed the jury that "as a matter of law a pistol and a sawed-off shotgun are both dangerous weapons" (Tr. 291). Appellant submits that an unloaded sawed-off shotgun is not a dangerous weapon unless utilized as a club and that in light of the record the jury could not find appellant guilty beyond a reasonable doubt under counts 4 and 6 of the indictment, and for this reason the convictions under those counts should be reversed. See

Nelms v. United States, 94 U.S. App. D.C. 267, 215 F.2d 678 (1954); Baber v. United States, 116 U.S. App. D.C. 358, 324 F.2d 3?? (1963); cert. denied, 376 U.S. 972 (1964).

II. The Evidence was Legally Insufficient to Justify Conviction of Appellant as an Aider and Abettor.

With respect to this argument, appellant desires that the Court read the following pages of the reporters' transcript: Tr. 1-115 inclusive.

Counts one through three of the indictment charged appellant respectively with armed robbery of John Decker, robbery of Decker, and assault upon Decker with a dangerous weapon. The jury, instructed that robbery was a lesser included offense under armed robbery, returned a verdict of guilty on counts one and three. Appellant submits that the evidence is insufficient to sustain the verdicts.

The theory of aiding and abetting is designed to impose responsibility for acts which one assists another in performing. Nye & Nissen v. United States, 336 U.S. 613, 620 (1949). To convict an accused of aiding and abetting a criminal offense, more than mere presence at the scene is required. Indeed the burden is on the government to prove beyond a reasonable doubt that a defendant knew a crime was being committed and that he made some conscious effort to assist or protect the criminal conduct of the principal actor. Allen v. United States, 103 U.S. App. D.C. 184, 186, 257 F.2d 188, 190 (1958) (dissenting opinion of Washington, J.) Appellant submits that the government's evidence does not meet such a standard.

Complainant Decker testified that he filled a single paper bag with currency and checks and handed the bag to the robber, later identified as Gregory Murphy (Tr. 41). After the money was handed over, the robber walked out "together with this other man that seemed to be waiting for him at the door." (Tr. 42). Detective Yeager, who apprehended Gregory Murphy outside the door of the Safeway, testified that Murphy had two brown bags in his hand (Tr. 75, 78), while Detective Bader testified that appellant carried a paper bag when arrested (Tr. 60).

In argument to the jury, the government referred to evidence that appellant and Murphy were seen together outside the Safeway and were seen leaving the store together, and from this alone the jury could conclude that there existed a "common enterprise" (Tr. 252). With respect to whether appellant was assisting Murphy, the government argued that if the jury concluded that appellant robbed Swenson then appellant ipso facto facilitated Murphy since Swenson could not come to the aid of Decker (Tr. 253). Additionally, the government argued that two bags were found on Murphy, and thus appellant must have given his paper bag to Murphy as the two left the Safeway, showing that the two were working together hand-in-glove (Tr. 253-54).

Reference by the government to an inference of "common enterprise" since the two men were seen together outside the Safeway was improper since appellant was not charged with conspiracy, and the jury was not instructed in terms of conspiracy. See Pereira v. United States,

347 U.S. 1, 10, n.1 (1954). Secondly, the argument that complainant Swenson was prevented from going to the aid of Decker is specious. Swenson testified that he "wasn't paying much attention" to anything but checking out his customer (Tr. 7). Asked whether he saw the other man, Swenson answered: "Well, I looked over to John's register and I could see someone and he looked like he was acting kind of funny but I didn't see him fully" (Tr. 10). It is apparent that Swenson was not even aware a robbery was in progress at the other register, and thus the argument that he was prevented from assisting his fellow employee lacks foundation.

Finally, with respect to whether appellant handed a paper bag containing money to Murphy, the government's evidence at trial was in dispute. Detective Yeager testified that Murphy carried two bags (Tr. 75, 78), while Detective Bader testified that appellant carried a paper bag (Tr. 60). In this state of the evidence, an inference that appellant handed a paper bag to Murphy would be clearly improper. As the Eighth Circuit has said in an aiding and abetting situation, "[I]nferences must be based upon proven facts." Johnson v. United States, 195 F. 2d 673 (8th Cir. 1952). And, with respect to the assault on Decker with a dangerous weapon, there is no evidence whatsoever that appellant assisted Murphy.

Appellant submits that the jury could not fairly conclude beyond a reasonable doubt that appellant assisted Gregory Murphy in the robbery and assault upon complainant Decker and that the conviction on counts 1 and 3 should be reversed.

III. Conviction of Appellant For Offenses In Which He Was Charged as Principal Actor Was Secured Improperly Through Evidence of Offenses in Which He Was Charged as Aider and Abettor.

With respect to this argument, appellant desires that the Court read the following pages of the reporters' transcript: Tr. 1-115 inclusive.

Viewing the record in the light most favorable to the government as is held to be necessary at this stage, Kemp v. United States, 114 U.S. App. D.C. 88, 311 F.2d 774 (1962), appellant submits that the government's case against appellant for the robbery of Gary Swenson (hereafter "the Swenson robbery") was exceedingly close to say the least. Additionally, there is disclosed little evidence that appellant aided or abetted Gregory Murphy in the robbery of John Decker (hereafter "the Decker robbery"). Accordingly, the government's case against appellant on the Swenson robbery was enhanced by the prosecution's ability, over the strenuous objection of defense counsel, to elicit evidence of the Decker robbery.

The Federal Rules of Criminal Procedure provide that two or more offenses may be charged in the same indictment if the offenses charged are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. Fed. R. Crim. P., Rule 8(a). It is also settled in this jurisdiction that where defendants are charged properly as principals the act of one defendant is the act of each. E.g., Turberville v. United States, 112 U.S. App. D.C. 400, 303 F.2d 411

(1962); cert. denied, 372 U.S. 946 (1962). Nevertheless, the theory of aiding and abetting is designed to establish criminal responsibility for acts which one assists another in performing. Nye & Nissen v. United States, 336 U.S. 613, 620 (1949). Appellant submits that the aiding and abetting theory is abused when utilized by the prosecution to improve its evidence of a distinct offense.

The decisions in this jurisdiction which deal with the aiding and abetting statute, 22 D.C. Code §105, in almost every instance involve the question whether one is guilty of a substantive offense though he did not physically participate in carrying out the offense. In other words, the theory of aiding and abetting has generally been utilized in situations where several defendants are charged with an offense or offenses, and the issue is whether there exists criminal participation in such offenses so as to render the defendant guilty just as if he were the principal actor. In most instances one is not charged as principal on a theory of aiding and abetting along with another offense arising out of the same transaction which charges defendant as the principal actor. See Kemp v. United States, 114 U.S. App. D.C. 88, 311 F.2d 774 (1962); Allen v. United States, 103 U.S. App. D.C. 184, 257 F.2d 188 (1958); Williams v. United States, 94 U.S. App. D.C. 219, 215 F.2d 35 (1954); Lanham v. United States, 87 U.S. App. D.C. 357, 185 F.2d 435 (1950); Ladrey v. United States, 81 U.S. App. D.C. 127, 155 F.2d 417 (1946); Frend v. United States, 69 U.S. App. D.C. 281, 100 F.2d 691 (1938); Tomlinson v. United States, 68 U.S. App. D.C. 106, 93 F.2d 652

(1937); Story v. United States, 57 App. D. C. 3, 16 F. 2d 342 (1926); Williams v. United States, 55 App. D. C. 239, 4 F. 2d 432 (1925); Egan v. United States, 52 App. D. C. 384, 287 Fed. 958 (1923); Polen v. United States, 41 App. D. C. 4 (1913); Maxey v. United States, 30 App. D. C. 63 (1907); Williams v. United States, 190 A. 2d 269 (D. C. Ct. App. 1963); Rogers v. United States, 174 A. 2d 356 (Munic. Ct. App. D. C. 1961); Sellers v. District of Columbia, 143 A. 2d 96 (Munic. Ct. App. D. C. 1958); Jack Berman, Inc. v. District of Columbia, 132 A. 2d 147 (Munic. Ct. App. D. C. 1957); Cooper v. United States, 123 A. 2d 918 (Munic. Ct. App. D. C. 1956).

Appellant submits that the government's evidence concerning the Swenson robbery was sufficiently weak as to raise a serious question whether it should have gone to the jury. Thus the complainant Swenson was not asked to identify appellant as the man who had robbed him, nor did the witness Decker offer incriminating evidence against appellant except by stating that a man was "standing in checkstand No. 1" (Tr. 42) and that Gregory Murphy "walked out together with this other man that seemed to be waiting for him at the door" (Tr. 42). Neither Detective Bader nor Yeager testified that appellant appeared to be engaged in a hold-up when the two detectives looked through the front window of the Safeway, and the government's own witnesses were in conflict on the crucial matter of whether appellant carried a grocery bag from the store containing stolen currency. Detective Bader testified that he observed a paper bag in appellant's left hand after he emerged from the store (Tr. 60),

while Detective Yeager testified that Gregory Murphy carried two paper bags containing currency (Tr. 75, 78). On cross-examination, Detective Yeager testified that apart from the two bags carried by Gregory Murphy, no other bags were seen by him in the area (Tr. 86). Moreover, neither of the witnesses Swenson or Decker, who testified that they observed appellant and Gregory Murphy depart the store, testified as to any passage of paper bags from one man to the other.

In the circumstances, appellant submits that the primary usefulness of evidence of the Decker robbery was to support the government's case against appellant on the offense in which he was charged as the principal actor. Appellant submits that appellant's convictions on the latter counts were thereby improperly secured and should be reversed.

IV. The Trial Court Committed Prejudicial Error in Instructing the Jury It Could Find Appellant Guilty of the Crimes Charged Without Finding That He Committed All Elements of the Offense.

With respect to this argument, appellant desires that the Court read the following pages of the reporters' transcript: Tr. 276-307 inclusive.

After instructing the jury in connection with the seven offenses charged in the indictment, the trial court charged as follows:

> Now, you may find the defendant guilty of the crime or crimes charged in the indictment without finding that he personally committed each of the acts constituting the offense, or that he was personally present at the commission of the offense. (Tr. 293).

There follows in the transcript of the instructions four additional passages relating to aiding and abetting of offenses.

The prosecutive theory was that appellant aided or abetted the commission of the offenses charged in counts one, two, and three of the indictment and that appellant was the principal actor in counts four through seven. The trial court's instructions, however, do not indicate that the passage set forth above relates solely to counts one, two and three. Moreover, the jury was not instructed, in connection with multiple count indictments, that the fact of a finding of guilt on any one count should not influence a verdict with respect to other counts of the indictment. See, e.g., Bar Ass'n of D.C., Criminal Jury Instructions for the District of Columbia, Charge No. 30 (1966).

It is fundamental that by a plea of not guilty an accused puts the government to the burden of proving every element of the crime beyond a reasonable doubt. Byrd v. United States, 119 U.S. App. D.C. 360, 342 F. 2d 939 (1965). In the instant case count one of the indictment charged appellant with the robbery of John Decker while armed with a pistol, and in counts two and three appellant was charged respectively with robbery of Decker and assault upon Decker with a dangerous weapon. The court instructed as to the essential elements of the offenses in counts one, two, and three, "each of which the Government must prove beyond a reasonable doubt" (Tr. 284). After instructing on the remaining counts, the jury were told that the defendant could be found guilty of the crimes charged in the indictment

without finding that he committed each of the acts constituting the offense (Tr. 293). Quite clearly it was plain error for the court below to fail to limit this instruction to the first three counts. Nor can it be assumed that each member of the jury was sufficiently informed on the law so as to disregard the instruction except with respect to the first three counts. See Kotteakos v. United States, 328 U.S. 750, 769 (1946). The jury knew full well that appellant had not committed each of the acts constituting the offense of robbery of John Decker yet were told it was competent for them to convict if appellant knowingly associated himself with the criminal venture (Tr. 293). Under instruction that appellant could be found guilty without having committed each of the acts constituting the offense, the jury could well have thought that association in a criminal venture was also adequate in counts four through seven without the necessity of proof that all the elements of those offenses had been proved. Appellant submits that the unlimited instruction allowing conviction of the crimes charged without a finding that each of the acts constituting the offense were committed by appellant constitutes reversible error.

V. Appellant and Gregory Murphy Were Subjected to an Illegal Confrontation In Violation of Sixth Amendment Rights Subsequent to Their Arrest, and the Courtroom Identification of Murphy Was Admitted Erroneously.

With respect to this argument, appellant desires that the Court read the following pages of the reporters' transcript: Tr. 12, Tr. 20-21 inclusive, Tr. 37-44 inclusive, and Tr. 92-94 inclusive.

Over the objection of defense counsel, complainant John Decker on direct examination testified that he subsequently learned the name of the man who robbed him to be Gregory Murphy (Tr. 44). On cross-examination of Detective Yeager it developed that, upon their arrest, appellant and the other man were transported to the 6th Precinct Station where they were viewed in the detectives' room by the two complainants. According to Detective Yeager, "I would say that at the time we had the defendants, both of them in the precinct, and the two complainants, Mr. Decker and Mr. Swenson, I don't know which one of the two, but one of them made an identification." (Tr. 93). Defense counsel further elicited that no attorney was present when the confrontation in the detectives' room at the 6th Precinct occurred (Tr. 94).

The confrontation at the 6th Precinct, occurring without benefit of counsel, was clearly an illegal showup in violation of appellant and Murphy's Sixth Amendment right to counsel. United States v. Wade, 388 U.S. 218 (1967); Stovall v. Denno, 388 U.S. 293 (1967). The facts surrounding the stationhouse identifications, while not as fully developed in the record as might be desired, indicate clearly enough that the confrontation was conducted in circumstances impermissibly suggestive. Thus the record discloses that only the appellant and Murphy were present in the detectives' room when the complaining witnesses were brought in and that counsel was not present. Nor do the facts bring this case within the purview of those decisions which permit immediate on-the-scene confrontations where the circumstances may be such as to promote fairness

by insuring reliability. E.g., Russell v. United States, ___ U.S. App. D.C. ___, 408 F.2d 1280 (1969); Wise v. United States, 127 U.S. App. D.C. 279, 383 F.2d 206 (1967), cert. denied, 390 U.S. 964 (1968). No particular exigency required that the safeguards of a formal lineup be dispensed with. The confrontation was improper, and it thus became necessary that the identification of Murphy at trial be shown by clear and convincing evidence to have an independent source. See Hawkins v. United States, ___ U.S. App. D.C. ___, ___ F.2d ___ (No. 21,997, decided July 9, 1969); Solomon v. United States, ___U.S. App. D.C. ___, ___ F.2d ___ (No. 22,155, decided February 12, 1969).

Under the stringent standard established by the Supreme Court in Chapman v. California, 386 U.S. 12, 24 (1967), "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." This Court has recently stated that an eyewitness identification by the complaining witness will not normally meet the Chapman standards for harmless constitutional error. Solomon v. United States, supra, slip opinion at 4. Here the government did not offer an in-court identification of appellant through the witness Swenson whom appellant was accused of robbing, and thus the identification of Murphy as the other robber materially aided the government's case against appellant.

In sum, the identification at the 6th Precinct was clearly improper under the Supreme Court decisions in either Wade or Stovall and violated

appellant's Sixth Amendment right to counsel. Appellant submits that the identification of Murphy at trial by complainant Decker was not shown by clear and convincing evidence to have had a source independent of the illegal showup and the introduction of such testimony was error. Appellant further submits that the constitutional error was not harmless under the Chapman standard and for that reason should be noticed under Rule 52(b), Fed. R. Crim. P. Appellant's convictions should thus be reversed or at least remanded for hearing on the facts surrounding the identification.

CONCLUSION

For the foregoing reasons, appellant urges that his convictions on each count must be reversed and remanded for a new trial. He further urges that the case be remanded with directions to enter judgment of acquittal on counts one, three, four, and six.

Respectfully submitted,

/s/

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Counsel for Appellant
Appointed by This Court

Dated: September 8, 1969

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief was served upon the United States Attorney for the District of Columbia by mailing a copy thereof to him at his office in the United States Court House, Washington, D.C. 20001, this 8th day of September, 1969.

/s/
Paul A. Lenzini

REPLY BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22, 832

United States of America, Appellee

v.

Joseph D. Gantt, Appellant

Appeal From the United States District
Court for the District of Columbia

Paul A. Lenzini
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Washington, D. C. 20004

Counsel For Appellant
Appointed by This Court

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,832

UNITED STATES OF AMERICA, Appellee

v.

JOSEPH D. GANTT, Appellant

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

Reply Brief for Appellant

I. An Unloaded Weapon Not Shown by the Evidence to Have Been Used as A Striking Instrument Is Not a Dangerous Weapon Because of Its Capability to be Used as a Striking Instrument.

As pointed out in appellant's main brief, affirmative testimony of the government during its case-in-chief was such that it could not fairly be concluded beyond a reasonable doubt that the shotgun carried by appellant was loaded at the time of the robbery (Brief for Appellant, p. 13). Appellee does not contest this but argues instead that a firearm is "inwrought with a dual dangerousness" since it may be utilized either as a shooting instrument or as a striking instrument, and that it is the firearm's capability for either use that renders it a dangerous weapon whether or not loaded (Brief for Appellee, pp. 9, 10). For the proposition that its potential for use as a club renders a firearm a dangerous weapon, appellee cites McGill

v. United States, 106 U.S. App. D.C. 136, 270 F.2d 329 (1959), cert. denied, 362 U.S. 905 (1960), and MacIlrath v. United States, 88 U.S. App. D.C. 270, 188 F.2d 1009 (1951). Neither case supports appellee's contention.

In McGill, appellant argued that conviction of assault with a dangerous weapon was improper in view of the testimony by the complaining witness that "the man who hit at me with a pistol didn't hit me." This Court through Judge Bastian rejected the argument declaring, "A pistol so used is undoubtedly a dangerous weapon; and the fact that the attempt to pistol-whip the complaining witness did not result in physical injury does not make the action any the less an assault with a dangerous weapon." 106 U.S. App. D.C. at 138, 270 F.2d at 331. MacIlrath involved a charge of assault with a dangerous weapon, the evidence showing that appellant shot a man in the chest with a pistol and then utilized the pistol to club two women. This Court rejected a contention that an instruction on simple assault should have been given, stating:

> Obviously the shooting, if not accidental, was nothing less than assault with a dangerous weapon. We also think the pistol used as a club in the violent manner shown by the evidence was still a dangerous weapon. Hickey v. United States, 9 Cir. 1909, 168 Fed. 536, 538, 22 L.R.A., N.S., 728. Serious injury will very likely result from such use of a pistol, and did result in this case. 88 U.S. App. D.C. at 270-271, 188 F.2d at 1009-1010.

These cases hold that firearms when actually used as clubs are dangerous weapons; they do not hold that firearms are dangerous weapons because of a capability to be used as clubs.

II. A Showing that the Perpetrator was Armed with a Dangerous Weapon is Requisite to the Offense of Robbery When Armed, 22 D. C. Code §§2901, 3202.

With respect to the offense of assault with a dangerous weapon, substantial authority exists that the charge is not made out where it is established that the firearm was not loaded at the time of the assault. In American Jurisprudence it is said: "The authorities are unanimous in holding that pointing an unloaded firearm in a threatening manner does not constitute an assault with a deadly weapon, within the contemplation of statutes providing for punishment of such assault. To constitute an assault with a dangerous weapon, where the weapon used was a gun, it must appear that the gun was loaded." 4 Am. Jur. Assault and Battery §35 (1936).[1]

Recognizing the tenor of the authorities on this point of law, appellee argues that some courts distinguish between assault with a dangerous weapon and robbery and that where an unloaded weapon is employed in connection with the latter offense, it is held to be immaterial whether the weapon is loaded. In support thereof it is argued that the offense of robbery is independent of the assault and may be accomplished

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1. The current edition of the same work, referring to simple assault, states as the prevailing view that "where it is established that the firearm was not loaded at the time of the assault, or where there is absence of proof that it was loaded at that time, the crime of assault is not made out." 6 Am. Jur. 2d Assault and Battery §34 (1963). Elsewhere in the same section it is said that, on the theory of apparent ability, some cases reject the contention that simple assault cannot be committed with an unloaded firearm, but it is noted that the apparent ability concept does not extend to the crime of assault with a dangerous weapon. Ibid.

by intimidation as by force, citing Wharton who in turn relies on State v. Deso, 1 A. 2d 710 (Vt. 1938), and McNamara v. People, 48 Pac. 541 (Colo. 1897). In State v. Deso, supra, the court recognized as "obvious that an unloaded revolver is not a dangerous weapon when used as a firearm only." 1 A. 2d at 714. But, the court added, in cases of robbery that offense is independent of the assault and may be accomplished by intimidation as by force. For this proposition the Vermont court referred to McNamara v. People, supra.

In McNamara, appellant had been convicted of assault with intent to commit robbery. On appeal error was alleged with respect to the trial court's instruction that if a firearm had been pointed at the victim within shooting distance the law would presume the weapon to be loaded. The Colorado court reviewed the aggravated assault cases holding the prosecution must show that a firearm was loaded and the cases holding that if a firearm is utilized in a threatening manner it may be inferred that the firearm was loaded unless the defendant shows otherwise. E. g., Randall v. United States, 215 F. 2d 587 (9th Cir. 1954); Jackson v. United States, 102 Fed. 473 (9th Cir. 1900). Referring to these decisions, the court stated:

> This diversity of opinion has arisen in cases wherein the alleged assault was made towards the perpetration of an offense that could not possibly be consummated unless the firearm was loaded--such as murder or bodily injury. And we find no case wherein the facts essential to support

> the allegation of an assault with intent to commit robbery or a like crime is discussed or determined; this being an offense that may be committed by intimidation, as well as by actual force. The intimidation of a person may be just as effectually accomplished by an apparent, as well as an actual, ability to inflict the menaced injury; and therefore the reason of the rule adopted in the cases holding proof of an actual ability necessary is not applicable to a case of this character. 48 Pac. at 543.

The authorities thus appear to hold that a present ability to inflict injury is necessary in cases of assault with a dangerous weapon--some courts holding that the prosecution must prove the weapon is loaded, other courts holding that such fact may be inferred if a weapon is put to its ordinary use with the contrary a matter for defense. As to armed robbery, decisions referred to by appellee which hold that an unloaded weapon is a dangerous weapon within the meaning of statutes proscribing robbery while armed with a dangerous weapon do so upon the ground that actual ability to inflict injury is unnecessary. Actual ability is said to be unnecessary since (1) robbery is distinct from the assault; and (2) robbery is an offense that may be committed by intimidation as well as by actual force, and the intimidation may just as well be accomplished by an apparent as an actual ability to inflict injury.

Appellant submits that the defect in such reasoning is simply that in robbery under 22 D. C. Code §2901 the critical element of the offense is a taking by force or violence. Jackson v. United States, 123 U.S. App. D. C. 276, 359 F. 2d 260 (1966), cert. denied, 385 U.S. 877.

Thus, intimidation, the creation of an apprehension of danger, is or may be present in ordinary robbery. Perkins, Criminal Law, 239 (Foundation Press 1957). If robbery while armed with a dangerous weapon may call down upon the perpetrator a more severe penalty than ordinary robbery, it must follow that some more serious element than creation of an apprehension of danger must be present, viz., the actual possibility of injury through use of a dangerous weapon. This is compelled not only by logic but by decisions of this Court. In Crosby v. United States, 119 U.S. App. D.C. 244, 339 F.2d 743 (1964), this Court through Judge Burger held that the offense of assault with a dangerous weapon is not necessarily included in an indictment charging robbery. And in Young v. United States, 109 U.S. App. D.C. 414, 288 F.2d 398 (1961), cert. denied, 372 U.S. 919 (1963), it was held that assault with intent to commit robbery and assault with a dangerous weapon are separate and distinct offenses since the former embraces the element of specific intent to commit robbery not embraced in the latter, and the latter includes use of a dangerous weapon not found in the former. It is clear therefore that use of a dangerous weapon is an element not present in robbery, and it is this element, not the creation of an apprehension of danger, that distinguishes armed robbery under the statute.

III. The Concurrent Sentence Doctrine Has No Application in the Instant Case.

As a last line of defense, appellee calls forth Hirabayashi v. United States, 320 U.S. 81 (1943), inviting this Court (1) to decline

consideration of appellant's contentions regarding the unloaded shotgun in connection with the convictions of armed robbery of and assault with a dangerous weapon upon Gary Swenson if appellant was properly convicted as an aider and abettor of the offenses against John Decker (Brief for Appellee, p. 17, n. 23); (2) to decline consideration of questions involving assault with a dangerous weapon should the Court find appellant's conviction sustainable as to either armed robbery count (Id., p. 18, n. 23); and (3) to decline consideration of questions involving the trial court's instructions concerning offenses against Gary Swenson should the Court find appellant properly convicted as an aider and abettor of the offenses against John Decker (Id., p. 24, n. 28).

In Benton v. Maryland, 395 U.S. 784 (1969), the Supreme Court last term stated that the concurrent sentence rule "may have some continuing validity as a rule of judicial convenience." Though the rule survives, it seems apparent from the opinion of Justice Marshall that the rule is not in the ascendance and, as a rule of convenience, should be invoked with extreme care.

In circumstances where it was not certain that the trial judge would have imposed the sentence he did if appellant had been convicted solely upon the count which was not defective, this Court has vacated a general sentence and remanded for resentencing on the good count. Baber v. United States, 116 U.S. App. D.C. 358, 324 F. 2d 390 (1963). As stated

by the Second Circuit, the total sentences might well be less "if the convictions were shorn of the defective counts." United States v. Hines, 256 F. 2d 561, 563 (2d Cir. 1958). And see Nelms v. United States, 94 U.S. App. D. C. 267, 215 F. 2d 678 (1954).

In the instant case appellee urges a technical rule of convenience to avoid consideration of certain of appellant's contentions. At trial the prosecution urged conviction of armed robbery and assault with a dangerous weapon on the basis of a technical rule of responsibility, viz., that "Appellant knowingly associated himself with Murphy, in the offenses committed against Decker, so as to be an aider and abettor" (Brief for Appellee, p. 20). Appellant submits there should be no application of the concurrent sentence "rule" on the strength of such convictions.

Conclusion

For the foregoing reasons, appellant urges that his convictions on each count must be reversed and remanded for a new trial and that the case be remanded with directions to enter judgment of acquittal on counts one, three, four, and six.

Respectfully submitted,

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Appointed by This Court

Dated: January 12, 1970

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was served upon the United States Attorney for the District of Columbia by mailing a copy thereof to him at his office in the United States Court House, Washington, D. C. 20001, this 12th day of January, 1970.

Paul A. Lenzini

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States of America)
Appellee)
)
v.) No. 22, 832
)
Joseph D. Gantt)
Appellant.)

Petition For Rehearing
Or In The Alternative
Suggestion For Rehearing En Banc

Appellant by his attorney appointed by this Court respectfully requests a rehearing of his appeal by the panel or, in the alternative, suggests that importance of the questions raised warrants consideration by the Court en banc. This appeal was argued before Judges Wright, McGowan, and Wilkey on April 27, 1970. The judgment of the District Court was affirmed without opinion on May 12, 1970.

The facts of the case are these. Appellant and another man were arrested by two M. P. D. detectives at the door of a Safeway store seconds after two of the store's "checkers" had been robbed. At time of his arrest, appellant had in his possession an unloaded, sawed-off shotgun. During oral argument before this Court, government counsel conceded that the weapon was not loaded. The evidence affirmatively discloses that the weapon was not used or threatened to be used as a striking implement. Appellant was found guilty in the District Court on two counts of armed

robbery, two counts of assault with a dangerous weapon and one count of possession of a prohibited weapon. The dual convictions on armed robbery and assault with a dangerous weapon result from conviction for the incident in which appellant was charged as the principal actor and, on an aiding and abetting theory, from conviction for participation in the robbery carried out by the other man. Appellant was sentenced to imprisonment on February 7, 1969 for a term of ten to thirty years on each of the two armed robbery counts, three to ten years on each of the two aggravated assault counts, and one year on the possession of a prohibited weapon count, the sentences to run concurrently.

On appeal, appellant contended, inter alia, that the evidence, disclosing as it did that the weapon was neither loaded nor used as a striking implement, was insufficient to support conviction of armed robbery and assault with a dangerous weapon under the Code. This Court has never before had occasion to decide these basic questions.

Our Code provision relating to armed robbery, committing crime while armed, 22 D.C. Code §3202 (Supp. 1969), carries with it the possibility of imprisonment for life. While section 3202 enumerates certain weapons including sawed-off shotguns it is clear that such weapons are there enumerated within the context of "dangerous or deadly weapons." This Court in Tatum v. United States, 71 App. D.C. 393, 110 F.2d 555 (1940) has held that a dangerous weapon is "one likely to

produce death or great bodily injury," and an unloaded weapon simply does not meet the description. Indeed the commission of crime by persons carrying unloaded weapons is undoubtedly commonplace. Had Congress chosen to proscribe such conduct, common sense dictates that it would have been accomplished directly and distinctly, particularly where a sentence of life imprisonment is involved, rather than being approached obliquely as the government argues.

With respect to assault with a dangerous weapon, the insufficiency of the evidence is clearer if the authorities are to be credited. According to Wharton who has collected the decisions, it is "generally held that an unloaded gun, used only as a firearm, is not a dangerous weapon within the contemplation of statutes punishing as aggravated assault assaults made with a dangerous or deadly weapon." 3 Wharton, Crim. Law & Procedure §961, 113-14 (1957). The commentator also notes that "it has also been held that an unloaded weapon is a dangerous weapon within the meaning of a statute denouncing robbery, or assault with intent to rob, while armed with a dangerous weapon." Ibid. The treatise American Jurisprudence states as the prevailing view that "an assault with a dangerous or deadly weapon cannot be committed with an unloaded firearm which is used, or intended or apparently intended to be used, as a firearm, even if the person thus assailed is thereby put in

apprehension of an attack upon his body or life." 6 Am. Jur. 2d, Assault and Battery, §54.

Most jurisdictions, therefore, appear to hold that assault with a dangerous weapon is not made out if the weapon is shown to be unloaded (the weapon will be presumed loaded if nothing else appears). With respect to armed robbery, the decisions appear to be split on this question. This appeal squarely presented these important questions and appellant submits that the issues deserve resolution.

While the order of May 12, 1970 does not disclose the determining factor in the Court's affirmance of the judgment of the District Court, it seems apparent that resolution of the above issues could be avoided only by application of the concurrent sentence doctrine.

Since the decision in Benton v. Maryland, 395 U. S. 784 (1969), where Mr. Justice Marshall questioned whether the doctrine survives even as a rule of judicial convenience, the concurrent sentence doctrine has found few adherents. The First Circuit in United States v. Castro, 413 F. 2d 891 (1st Cir. 1969) elected to consider the validity of convictions on two of the three counts upon which appellant was convicted and sentenced to concurrent terms "in view of the Supreme Court's recent decision in Benton v. Maryland." 413 F. 2d at 892, n. 1. The Third Circuit has stated that the doctrine "met its demise" in the Benton case. United

States ex rel. La Molinare v. Duggan, 415 F. 2d 730, 736, n. 7 (3rd Cir. 1969) (opinion of Stahl, J., dissenting on other grounds). And in United States v. McKenzie, 414 F. 2d 808 (3rd Cir. 1969), the Third Circuit, expressing doubt as to validity of the concurrent sentence doctrine after Benton v. Maryland, vacated a lesser concurrent sentence erroneously entered, finding prejudice in that a "multiplicity of sentences impairs a prisoner's opportunities for pardon or parole." 414 F. 2d at 811. This Circuit, speaking recently through Judge Bazelon in United States v. Miller, No. 22, 332, 10 (March 23, 1970) has also had occasion to declare that the concurrent sentence doctrine "is presently in serious doubt."

In addition to the Supreme Court's apparent distaste for the concurrent sentence doctrine, the facts of this case militate against its application here. It is by no means certain that the trial judge would have imposed the sentence she imposed had appellant been convicted of armed robbery and/or assault with a dangerous weapon solely by reason of his"participation," on an aiding and abetting theory, in the robbery in which he was not the principal actor. See Baber v. United States, 116 U. S. App. D. C., 324 F. 2d 390 (1963). Appellant's conviction below on such counts, based at trial upon a technical rule of criminal responsibility, thus stands affirmed in this Court on the basis of a technical and largely discredited rule of convenience. Ap-

pellant submits that the concurrent sentence doctrine should not be applied in circumstances such as these and that if the evidence is insufficient on any count sentence should be vacated and remanded for resentencing.

Conclusion

For the foregoing reasons, appellant submits that this matter should be reheard by the deciding panel. Alternatively, appellant suggests that the Court's discretion would be appropriately exercised in ordering rehearing en banc.

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Appointed by this Court

Dated: May 26, 1970

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition and Suggestion was served upon the United States Attorney for the District of Columbia by mailing a copy thereof to him at his office in the United States Court House, Washington, D. C. 20001, this 26th day of May, 1970.

Paul A. Lenzini

Paul A. Lenzini